IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-740333-D1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Aubrey HAMILTON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1879

Aubrey HAMILTON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 14 January 1970, an Examiner of the United States Coast Guard at New York, N.Y., suspended Appellant's seaman's documents for four months plus eight months on twelve moths' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a steward yeoman on board SS SANA ROSA under authority of the document above captioned, on or about 8 September 1969, Appellant wrongfully threatened a named fellow crewmember with a knife while the vessel was at sea.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence certain documents and the testimony of certain witnesses.

In defense, Appellant offered in evidence his own testimony.

At the close of the taking of evidence, the Examiner announced on 9 January 1970 that he had found the charge and specification proved. On 16 January 1970 hearing was held on the matter of prior record. Unaccountably, the Examiner's decision is dated 14 January 1970. Appeal was filed on 30 January 1970, even though service was not accomplished on Appellant until 12 March 1970. Appeal was perfected on 13 October 1970.

FINDINGS OF FACT

On 8 September 1969, Appellant was serving as a steward yeoman on board SS SANTA ROSA and acting under authority of his document while the ship was at sea.

In view of the action to be taken, no further findings of fact are necessary.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Specific bases for appeal need not be discussed other than the one in which it is contended that the Examiner's findings are not based on substantial evidence.

APPEARANCE: Abraham E. Freedman, New York, N.Y., by Charles Sovel, Esq.

OPINION

I

One problem that is raised instantly in this case is caused by the wording of the specification. It was alleged that Appellant did "wrongfully threaten a fellow crewmember... with a knife..." It must first be ascertained what this means.

In the course of his opinion the Examiner noted that Appellant was not charged with a battery. More pertinently, it is noted here that the specification does not use the word "assault." In a proper case, it could be held that the words "threaten with a knife" constituted an adequate factual statement of an assault. I have the uneasy feeling, however, that both the Investigating Officer in his framing of the specification, and the Examiner in his treatment of the matter in his findings and opinion, were loath to think in terms of "assault" and believed that they were dealing with a lesser act of misconduct, namely a wrongful threat not amounting to assault.

There have been occasions when a threat to kill, without attempt to carry out the threat, and without the actual or even apparent means to carry out the threat, has been held to be misconduct on the part of a seaman. Decision on Appeal No. 1776; affirmed, NTSB Order No. EM9.

In every such case, however, there has been a threat to do something. When a weapon is involved and is present in hand the threat may be verbal or in the circumstantial facts, that harm is to be done. This, of course, is assault.

II

I am forced to construe the words "threaten with a knife" to be the equivalent of "assault with a knife" in the absence of

statement or evidence of any other object of the threat than bodily harm as this case is presented.

I intentionally do not rule out the possibility that misconduct might be found in a suggestive production of a weapon to induce a certain course of action at a relatively remote time without there being such a presentment of the weapon as to constitute assault. The question in the instant case is, "How did Appellant threaten the named victim with a knife?"

III

The Examiner acknowledgedly placed great reliance upon the testimony of one crewmember who, as he passed the office where the alleged events occurred, heard the alleged victim, who was entering the passageway, shout that Appellant had a knife and, looking in the door, saw what he thought was a steak knife in Appellant's hand, and on that of another witness who testified that, a short time later, he saw a bright metallic object in Appellant's hand.

This evidence would strongly corroborate the testimony of the alleged victim that what Appellant had in his hand was a knife. It does not in any way tend to prove a threat with the knife.

To find a threat with the knife recourse must necessarily be had to the testimony of the alleged victim. He testified to assault and battery with a knife. The full import of his testimony was specifically rejected by the Examiner. It is true, as Appellant admits, that the trier of facts may, in his discretion, either reject all the testimony of a witness found incredible on a certain point or reject only the testimony specifically found incredible but accept other testimony of that same witness as reliable.

In the instant case, once the Examiner had rejected the testimony of Appellant that he had been assaulted and battered with a knife and has specifically found that no threatening gesture had been made with the knife, there remained no credible evidence that there had been a threat with the knife, only that there had been a knife.

Whether the allegation be construed as tantamount to an assertion of assault or as alleging a wrongful threat not amounting to assault, no threat was established by the accepted evidence.

IV

The fact that Appellant was found to have made irreconcilable statements when he told one witness that he had a metal ruler in

his hand but in his testimony at hearing said that he had a stapler in his hand does not affect the result here. No matter how many times Appellant may have contradicted himself at various stages of explanation of the events, his contradictions do not constitute substantial evidence of something else. There is no question that when there is substantial evidence against a person charged inconsistent statements made by him to undermine an attempted defense. But inconsistent statements by a party do not of themselves constitute proof of some opposite or opposing statement not otherwise proved any more than does the rejection by a trier of facts of a statement made by a person charged of itself establish the truth of the opposite without affirmative substantial proof of the opposite. Decision on Appeal No. 894.

There is no such acceptable proof here.

CONCLUSION

I conclude that there is not substantial evidence to support the Examiner's findings in the instant case.

ORDER

The order of the Examiner dated at New York, N.Y., on 14 January 1970, is VACATED. The Charges are DISMISSED.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 31st day of May 1972.

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